



INTERNATIONAL
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RECASTING COMI; IMPLICATIONS AND PROSPECTS FOR BANKRUPTCY FORUM SHOPPING WITHIN THE EU

Giannoula Nikou

SCHOOL OF ECONOMICS,
BUSINESS ADMINISTRATION &
LEGAL STUDIES

A thesis submitted for the degree of
LL.M. (Master of Laws) in Transnational and European
Commercial Law, Mediation, Arbitration & Energy Law

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I hereby declare that the work submitted is mine and that where I have made use of another's work, I have attributed the source(s) according to the Regulations set in the Student's Handbook.

January 2017
Thessaloniki - Greece

Abstract

This dissertation was written as part of the LL.M. (Master of Laws) in Transnational and European Commercial Law, Mediation, Arbitration & Energy Law at the International Hellenic University.

The objective of the present thesis is to critically assess the effectiveness of the enhanced concept of 'Centre of Main Interests', commonly referred to as COMI, as amended by EU 2015/848 Recast Regulation on Insolvency Proceedings. To that effect, reference shall be made to the evolution of the concept throughout EU law, especially by way of comparison to its previous form under Regulation (EC) 1346/2000 on Insolvency Proceedings, as well as to landmark cases of ECJ case-law that shaped its interpretation.

Furthermore, the thesis addresses the impact of the amended COMI upon bankruptcy forum shopping within the Union and identifies the most significant reforms brought onto the latter by the Recast Regulation. Finally, it discusses the ambitious prospects that emerge with regard to 'legitimate' COMI shifts in the context of efficient debt-restructuring procedures, which –as such- can effectively evade the preventive scope of EU Insolvency Law.

Keywords: Insolvency, COMI, Recast Regulation, forum shopping, bankruptcy tourism

Giannoula Nikou

31.01.2017

Preface

I would like to thank my supervising professor, Dr. Pavlos E. Masouros, for his valuable support and guidance throughout the preparation of the present thesis, the subject of which was inspired by his meaningful and stimulating lectures.

I would also like to express my gratitude towards the International Hellenic University faculty for giving me the opportunity to develop, learn and improve within an excellent academic environment.

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Introduction

Transnational business activity constitutes a significant driving force on economic integration and market unification within the European Union. Nevertheless, the insolvency of undertakings engaged in cross-border operations can inhibit the proper functioning of the internal market. It should be noted that before the advent of the EU Insolvency Regulation¹ (hereinafter the EIR), cross-border insolvencies triggered a complex legal situation wherein insolvency proceedings were opened in multiple jurisdictions, therefore different bankruptcy laws came to apply on a sole debtor. The legal uncertainty and variability resulting from a situation as such, had detrimental effects upon the interests of creditors located in different Member States, as their lawful protection would vary from one jurisdiction to another. As aptly portrayed in the Report on the proposal of the Regulation “*while the EU has been active in its promotion of a successful European economy, it has been rather fruitless in the creation of European insolvency legislation*”².

The situation becomes even more dysfunctional when insolvent undertakings intentionally manipulate their corporate seat –*thus their bankruptcy seat*– in the hope of availing themselves of ‘debtor-friendlier’ insolvency law regimes. The need for preventing this practice, commonly known as *forum shopping*, has always been one of the main objectives of EU Insolvency Law. In particular, bankruptcy forum shopping has always been viewed as a ‘thorn’ in the sides of cross-border insolvencies, the “removal” of which is highly *unlikely*, at least for as long as substantive differences among national bankruptcy laws exist. The lack of substantive harmonization of national insolvency regimes is not only the number one *incentive*, but also a *sine qua non prerequisite* for forum shopping within the Union.

In this context, the place where a given undertaking conducts the administration of its interests and manages its operations, referred to as ‘Centre Of Main Interests’ or COMI³, becomes a particularly relevant concept in EU Insolvency Law. COMI represents the insolvent corporation’s bankruptcy seat and therefore determines the competent forum for opening main insolvency proceedings. Subsequently –if not more importantly– it also determines the applicable insolvency law (*lex fori concursus*) which effectively governs all the debtors’ assets irrespective of their location, thus enjoys

¹ Council Regulation (EC) 1346/2000 of 29 May 2000 on Insolvency Proceedings, OJEU L.160/1

² Report of the Committee on Legal Affairs and the Internal Market on the proposal for a Council Regulation On Insolvency Proceedings of 23 February 2000, A5-0039/2000, p. 9.

³ For the definition of COMI see art. 3(1) of Recast Regulation, *infra* n. 6

‘universal’ application. In this regard, COMI lays into the very core of EU Insolvency Law, as it represents the *unique* criterion for the allocation of international jurisdiction in bankruptcy cases having cross-border effects.

Nonetheless, the process of formatting COMI as an autonomous EU law concept has by no means been an easy task. As a matter of fact, the development of COMI proved to be an intense multiannual process⁴. After several unsuccessful efforts, an original version of the COMI concept was formally inserted into EU law by the EIR. The introduced concept, however, was criticized as being “*too volatile*”⁵ to be actually effective in preventing abusive forum shopping, while the absence of a concrete definition caused significant disparities in its interpretation by national courts. These factors gave room to companies in exploiting the opportunity for “bankruptcy tourism” and underlined the need for further improving the concept of COMI.

For this purpose, the EU adopted the so-called Recast Regulation⁶, which purports to smooth out the uncertainty of the previous regime by providing a relevant definition of COMI. However, certain doubts still remain as regards the actual efficiency of the enhanced concept in the pursuit of the objectives set by the Community. This skepticism is mainly based on recent corporate practices, which reinforce the hypothesis that increased certainty in COMI may serve to companies as a more effective “*users’ manual*” for COMI shifts in the context of bankruptcy forum shopping.

⁴ The conflict between national approaches as regards the diverse theories for determining the applicable company law, the existing gap between civil and common law jurisdictions in view of using legal presumptions versus objective elements in its definition, as well as the effort not to obstruct the exercise of fundamental rights guaranteed under EU law, are some of the factors that attributed considerable complexity to the concept of COMI.

⁵ See Lopucki, L. ‘Cooperation in International Bankruptcy: A Post-Universalist Approach’, Cornell L. Rev. (1999)

⁶ Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast) OJEU L 141/19

CHAPTER I. LEGAL BACKGROUND ON CROSS-BORDER INSOLVENCIES

1. The process towards the adoption of the European Insolvency Regulation

In contrast to other areas of EU law, cross-border insolvencies involve certain inherent particularities that require specialized legal attention. For this reason, the EU legislature soon decided to explicitly exclude⁷ transnational insolvencies from the scope of the 1968 Brussels Convention, but form instead a separate convention on the recognition of cross-border insolvency proceedings. However, as this process proved to be a multiannual and quite strenuous effort, the allocation of international jurisdiction as well as the recognition of court judgements in insolvencies having cross-border effects, were for almost three decades left to the regulatory scope of private international laws of the various member states⁸.

In 1980, a decade after the proposal of the first draft for a Bankruptcy Convention⁹, a “Working Party” under the auspices of EU Commission proposed a draft Convention on Bankruptcy proceedings, introducing therein a novel connecting factor which bared a close resemblance to the current concept of COMI¹⁰. At that time, however, the draft convention’s revolutionary and rather *aggressive*¹¹ “universalist” approach, was criticized as “extremist” and “impractical”, thus its adoption was directly abandoned. The subsequent 1990 ‘Istanbul Convention on Certain Aspects of Bankruptcy’ of the European Council, had significantly narrower scope¹², yet was not adopted due to concurrent difficulties in receiving wider acceptance. Still though, it was the first text

⁷ See Art. 1(2) of the 1968 Brussels Convention On Jurisdiction And The Enforcement Of Judgments In Civil And Commercial Matters (*OJ* 1972, L 299/32).

⁸ Before the adoption of the EIR, transnational insolvencies were operating under the “territorialism” approach. See Chapter I.3 p. 6

⁹ 1970 Draft Bankruptcy Convention, Commission Document No. 3.327/1/XIV, 1970.

¹⁰ Under the draft Convention, the main criterion for allocation of jurisdiction was the debtor’s “centre of administration”, the elements of which are closely linked with what is now conceived as COMI. See “Report on the Convention on Bankruptcy, Winding-Up, Arrangements, Compositions and Similar Proceedings”, signed by Jacques Lemontey.

¹¹ See Tirado, I. (2015) ‘An Evolution Of COMI In The European Insolvency Regulation: From ‘Insolvezimperialisumus’ To The Recast’, p. 2., and also G. S. Moss, S. Isaacs & I.F. Fletcher (eds.), *The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide*, Oxford: OUP 2009, par. 1.15-1.18.

¹² In contrast to the 1980 Convention on Bankruptcy, Winding-Up, Arrangements, Compositions and Similar Proceedings, the Istanbul Convention dealt only with liquidation proceedings and the recognition of liquidating acts only under certain circumstances.

embodying expressly the notion of COMI¹³, although it did not provide any further guidelines as to its interpretation.

A few years later, the persistent efforts of the European Council's Working Group led to the creation of the 1995 Convention on Insolvency Proceedings. Despite its noteworthy qualities, this text was once again never adopted, as it was not timely signed by all fifteen Member States. Nonetheless, it represents a considerable breakthrough in the field of EU Insolvency Law, as it is admitted to be the main influence of the EIR and the UNCITRAL Model Law. Furthermore, the Virgos/Schmidt Report¹⁴ on the Convention offered for the first time a concrete *explanation* of COMI, which -as a matter of fact- has been directly transposed into the recitals of the EIR¹⁵. Indeed, the said explanation was recognized as the '*main interpretative tool*'¹⁶ of the current COMI concept, and is acknowledged to be a '*useful guidance*'¹⁷ in terms of interpreting the EIR by the European Court of Justice (ECJ).

After the said numerous failed attempts, the European Union finally achieved to overcome national disparities by striking a long anticipated balance between the diverse legal theories and approaches residing within the realms of national insolvency laws. On 29 May 2000 the Union adopted the EU Insolvency Regulation (EIR)¹⁸, which came into effect on 31 May 2002. Although slightly more elaborate, EIR presents substantial similarities to the 1995 Convention, as the vast majority of its provisions are reproduced in an identical manner¹⁹. Upon entering into effect, therefore, the EIR became the first Community Law measure to be directly applicable²⁰ on transnational insolvency proceedings, wherein the debtor's COMI is to be found within the Union²¹.

¹³ See art 4 of the 1995 Convention on Insolvency Proceedings: "*The courts or other authorities of the party in which the debtor has the centre of his main interests shall be considered as being competent for opening the bankruptcy. For companies and legal persons, unless the contrary is proved, the place of the registered office shall be presumed to be the centre of their main interests*".

¹⁴ M. Virgós & E. Schmit, 'Report on the Convention on Insolvency Proceedings', 6500/1/96, REV 1, DRS 8 (CFC), 3 May 1996

¹⁵ See Virgos/Schmidt Report supra n. 14 para. 75: "*The concept of "centre of main interests" must be interpreted as the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties*" which was literally transposed into recital (13) of the EIR.

¹⁶ See Tirado, supra n. 11, p. 5.

¹⁷ Opinion of Advocate General Jacobs, ECJ EC 2 May 2006, C-341/04 (Re Eurofood IFSC Ltd), par.1.

¹⁸ Supra n. 1.

¹⁹ Opinion of the Economic and Social Committee no. C75/01 of 2000, par. 1.1.

²⁰ According to recital (8), the EIR is a Community Law measure and as such it shall be binding and directly applicable in all Member States.

²¹ Except from Denmark which did not adopt the Regulation, see recital (33) EIR.

2. Scope and Purposes of EIR

The EIR came to fill in the legislative gap existing in the area of transnational insolvency proceedings, the efficiency and effectiveness of which were crucial for the proper functioning of the internal market²². Nevertheless, before the adoption of EIR transnational insolvencies were lacking the aforementioned requirements, as insolvency proceedings were governed merely by national rules of private international law, while recognition of court decisions was highly dependent on the discretion of national courts. Against this background, the main purpose of EIR was to enhance the *efficiency* of cross-border insolvency proceedings, by laying down the necessary conditions that would ensure *legal certainty* and *predictability* across the Union. To that effect, the EIR set uniform conflict-of-law rules and established a unified legal framework on cross-border insolvencies, within which the jurisdiction, recognition and applicable law would be regulated in a uniform, pan-European manner²³.

The efficiency of cross-border insolvencies required also the *effective realisation* of the insolvent debtors' assets, through the proper *coordination* of the concurrent insolvency proceedings²⁴. In this regard, the Regulation set out to promote *close co-operation* between national courts and enable the exchange of sufficient amount of information²⁵. All these provisional measures would however have very limited effect without proper community action against *forum shopping*. The combat and prevention of malpractices involving the transferring of assets or judicial proceedings to debtor-friendlier jurisdictions, was therefore set as one of the fundamental objectives of EIR, as explicitly stated in its recitals²⁶.

Nonetheless, despite its noble intentions and far-fetching ambitions, the EIR suffered from several 'structural defects' that ended up hindering the realisation of the said objectives. Apart from the ambiguous –thus widely criticized- concept of COMI it introduced, the Regulation was significantly restrained in its material scope of application; under EIR the sole purpose of insolvency proceedings was liquidation, as its scope extended only to collective insolvency proceedings entailing the partial or total divestment of the debtor²⁷. The said deficiencies were a constant source of criticism of EIR and, inter alia, two of the main reasons that led to its revision.

²² Recital (2) EIR.

²³ Recital (23) EIR.

²⁴ According to recital (12) secondary proceedings may be opened in any state wherein the debtor has an establishment; such proceedings may therefore run in parallel with the main proceedings opened in the state of COMI.

²⁵ Recitals (3) and (20) EIR.

²⁶ Recitals (4) and (5) EIR.

²⁷ Recital (10) and Art.1(1) EIR.

3. Modified Universalism - The Best of Two Worlds

Prior to the adoption of EIR, transnational bankruptcies were governed by the principle of *territoriality*. According to this “*default rule*”²⁸ of national sovereignty, every Member State had exclusive jurisdiction over the portion of the insolvent debtor’s assets located within their territory. Participation in international judicial cooperation was left at the discretion of national courts, which however usually opted for ‘domestic’ insolvency proceedings according to their own bankruptcy laws. Therefore, under the so-called “*territorialism*” approach, insolvency proceedings involved multiple fora and “*widely differing*”²⁹ bankruptcy laws, applying simultaneously upon a single -yet “*multinational*”³⁰-debtor. In principle, this traditional approach was severely criticized by the majority of scholars³¹, although there has been also a minority of proponents³².

Acknowledging the detrimental effects of territorialism upon the actual efficiency of bankruptcies having cross-border effects, initial propositions suggested a shift towards the opposite end of “*universalism*”. In its purest form called “*unity*”³³, universalism envisaged the existence of a single bankruptcy forum which, in the course of unified proceedings, would apply a single bankruptcy law of universal scope. Although adding to the overall efficiency of transnational insolvencies, the utter surrender of national sovereignty required under such a *holistic* approach, rendered universalism a highly impractical and rather unrealistic ideal. Nonetheless, the prominent advantages³⁴ thereof, offered the EU legislator strong motives to adhere to the universalist paradigm, at least in principle.

In this regard, the EIR opted for a “hybrid” bankruptcy model which represents a compromising solution between the two opposing theories. The so-called “*modified universalism*”³⁵ adopted by EIR moves in principle within the sphere of universalism,

²⁸ See John J. Chung, ‘The Retrogressive Flaw of Chapter 15 of the Bankruptcy Code: A Lesson from Maritime Law’, 17 DUKE J. COMP. & INT’L L. (2006–07) 253, 262: “*Territorialism is the default rule in every substantive area of law, including [. . .] bankruptcy*”.

²⁹ Recital (11) of EIR.

³⁰ As this term is used by A. Dawson. See Dawson, A. ‘Offshore Bankruptcies’, Nebraska Law Review Vol. 88:317 (2009)

³¹ See for example, Donald T. Trautman et al., ‘Four Models for International Bankruptcy’, 41 AM.J. COMP. L. (1993) at 575, referring to territoriality as “*tyranny*”, and Daniel M. Glosband & Christopher T. Katucki, ‘Claims and Priorities in Ancillary Proceedings Under Section 304’, 17 BRool J. INT’L L. (1991) , suggesting that territoriality represents a “*sacrifice*” of international co-operation.

³² Lopucki, supra n. 5

³³ Ibid.

³⁴ Some of the most important arguments in defence of universalism refer to the enhanced legal certainty and maximized efficiency in cross-border insolvency proceedings. See (ibid.) LoPucki, supra n. 5

³⁵ Other authors use the term “*controlled universality*” in order to refer to the modification of universalism by the principle of territoriality, see in particular Belohlavek, A. ‘Centre of main Interests

while retaining some elements of territoriality³⁶. In particular, it provides for main insolvency proceedings opened in the state of the debtor's COMI, as well as for territorial secondary proceedings that may be opened in any other member state, wherein assets of the debtor are located. Main proceedings have universal effect upon all debtor's assets, whereas the effects of secondary proceedings cover only the portion of assets located in their jurisdiction. The latter are, in fact, auxiliary³⁷ to the main proceedings, but they do offer local courts the chance to participate in the single distribution system and ensure the protection of local creditors' interests.

The Regulation's modified universalism approach opened the path to consistent judicial co-operation in cross-border insolvencies, in the hopes of enhancing the overall efficiency thereof. Its duplicate structure is built upon a simple choice-of-forum rule, based on a single connecting factor; the location of the insolvent debtor's COMI. In this regard, COMI seeks to enhance legal certainty, as it offers a simple rule for the resolution of potential (positive) conflicts of jurisdiction.

On the other hand, this criterion effectively serves also as a *choice-of-law* rule; the determination of COMI points towards the insolvent company's *bankruptcy seat*³⁸, which subsequently determines the applicable insolvency law. As a result, potential manipulation of COMI can lead to the application of an entirely different law, which, by being the *lex fori concursus*³⁹ will enjoy universal scope. Therefore, COMI shifts may work as an efficient 'tool' for bankruptcy forum shopping in the hands of insolvent companies having cross-border presence.

(COMI) and jurisdiction of national courts in insolvency matters (insolvency status)' International Journal of Law and Management, Vol 50 No.2 (2008), at 54.

³⁶ According to recital (11) EIR, due to the significant disparities existing in EU substantive laws, the adoption of a pure universalist approach would not be practical since it would entail considerable difficulties in the efficient management of insolvencies having cross-border effects.

³⁷ Or else "ancillary" proceedings, see Dawson supra n. 30

³⁸ i.e. the place where main insolvency proceedings shall be opened according to recital (12) EIR.

³⁹ According to recital (23) of EIR, the *lex concursus* (law of the forum) encompasses all assets, persons and legal relations, determines all the substantive and procedural effects of the insolvency proceedings, and governs all the conditions for the opening, conduct and closure thereof.

CHAPTER II. SHAPING COMI AS AN AUTONOMOUS EU LAW CONCEPT

1. The Real Seat V. Registered Seat Debate

The question “*where shall the company’s seat be?*” will most probably receive differing answers in the various jurisdictions, depending on the particular *theory*⁴⁰ that is traditionally applied in determining the place of the company’s seat.

Common law jurisdictions support the view that a company shall be governed by the law of the state where it has its *registered seat*. Hence, the so-called “*incorporation theory*” provides a simple and objective rule; the centre of main interests is at the place of the company’s registered office, thus the applicable company law is that of the state of registration. Under the incorporation theory international jurisdiction in cross-border situations is easily determined, for there is no need to endure *factual* evaluations in order to assess the actual location of the company’s activities.

It is also supported that the ‘registered seat’ doctrine enables companies to relocate freely, simply by moving their registered seat to another jurisdiction. Therefore, the incorporation theory promotes efficient corporate mobility within the internal market, thus facilitates the exercise of the fundamental freedom of establishment of art. 49 TFEU⁴¹. Nonetheless, this fact is also the main *deficiency* of the incorporation theory with regard to cross-border insolvencies; it not only doesn’t restrict, but actually *allows* bankruptcy forum shopping within the Union.

On the other hand, civil law jurisdictions applying the “real seat” theory support that a corporation shall be governed by the law of the state where its *actual seat* is (i.e. the centre of management and administration). In practice, this view has proved highly problematic, as this doctrine is founded upon a connecting factor for which no general agreement exists; in the absence of *commonly recognized criteria* for assessing the centre of administration (i.e. centre of main interests), it is quite difficult to determine the company’s real seat. Consequently, national courts of different jurisdictions may apply different criteria⁴² for the determination of the company’s real seat, probably resulting in

⁴⁰ This matter refers to the ‘real seat’ v. ‘registered seat’ debate, existing between common law and civil law jurisdictions, respectively. The real seat doctrine was developed in France and applies in most civil law jurisdictions of continental Europe., whilst the incorporation theory (registered seat) is mostly used in common law jurisdictions. Within the EU, it is applied in the UK, the Netherlands and Scandinavia.

⁴¹ Art. 49 TFEU reads: “*Freedom of establishment shall include the right to (...) set up and manage undertakings, in particular companies or firms (...)*”

⁴² Such variable criteria may be the place where the economic strategy of the corporation is determined, where its assets are located, where its employees and corporate equipment is, the place where the contracts are signed or the national law governing these contracts, the place where the board of shareholders’ meetings are held, etc.

different outcomes. As it is also pointed out⁴³, they may do so, in their effort to *justify ex post* their own jurisdiction.

This situation creates legal uncertainty which has detrimental effects upon the efficient allocation of international jurisdiction in cross-border insolvencies. Nonetheless, this doctrine presents a significant advantage; since the requirements⁴⁴ of the real seat theory impose certain restrictions to the freedom of establishment, this doctrine can effectively *inhibit* bankruptcy forum shopping.

2. COMI Under EIR - A Defective Concept

The development of COMI as an autonomous EU law concept was the result of a *synthetic* process, aiming to strike a balance between the said opposing approaches. Since each of the doctrines presents strong and weak points, the creation of COMI was formatted according to a dual structure, using elements of both theories⁴⁵. After all, this choice was implicitly dictated by the dual purpose⁴⁶ of EU Insolvency law; the need for improving the efficiency and effectiveness of cross-border insolvency proceedings, while preventing bankruptcy forum shopping within the Union.

To that effect, COMI comprises both of *presumptions* as well as *objective criteria*; the registered seat presumption purports to enhance legal certainty and predictability, while the provision of *objective criteria* as to real seat of the debtor enables an ad hoc determination of COMI on a case-by-case basis. In this way, EIR's 'centre of main interests' concept retains a certain degree of *flexibility*, which allows the adoption of "*economically efficient solutions*"⁴⁷ for corporations, without further obstructing their corporate mobility across Europe.

⁴³ According to Tirado (supra n. 11), courts tend to "*keep proceedings at home*", by interpreting the centre of main interests on the basis of a wide variety of facts and circumstances which they consider as evidence that the centre of administration is located in their seat. This phenomenon reflects the absence of 'mutual trust' between courts of Member States which leads to positive conflicts of jurisdiction.

⁴⁴ In Member states applying the real seat theory, the separation of the registered office from the central administration is not possible, because they require that since the real seat of the company is located there and is subject to the national company law requirements, the registered office shall be there too.

⁴⁵ Tirado, supra n. 11. According to Tirado "[T]he existence of both civil and common law jurisdictions, with different national systems, explains the combination of a general criterion with presumptions based on objective elements"

⁴⁶ Recitals (2) and (4) of EIR

⁴⁷ Tirado, supra n. 11 (p. 5)

In particular, EIR identifies COMI by focusing *primarily*⁴⁸ on a uniform –yet rebuttable– presumption. Under art. 3(1) EIR, COMI shall be presumed to be the place of the registered office, but only *“in the absence of proof to the contrary”*. Therefore, the rule is that COMI is the registered seat, unless proven otherwise. However, the provisions of EIR remain silent as to which specific circumstances and facts can be regarded as adequate proof to rebut the said presumption.

The only guideline thereof is contained in preamble language and particularly in recital (13), which lays down several criteria for the determination of COMI in cases where the presumption of art. 3(1) is weak or rebutted. Under recital (13), which constitutes a word-for-word transposition of the explanation of COMI contained in Virgos/Schmidt Report⁴⁹, *“the centre of main interests should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties”*. According to Wessels⁵⁰ this explanation bears a *“law and economics dimension”*, as it places the spotlight onto the *perception* of the debtor’s *potential creditors* as to where the actual COMI is. After all, creditors should be able to calculate *a priori* the risks of insolvency, as aptly pointed out in the Report⁵¹.

Nonetheless, regardless of how useful of an *“interpretational tool”*⁵² the Virgos/Schmidt Report is, it should not be forgotten that the latter *does not* form part of the adopted Regulation. Instead, it constitutes an ‘external’ source of detailed explanations and justifications for the interpretation of COMI, without which the latter is simply *taken out of context*.

If one would focus merely on the particular excerpt transposed into recital (13) of EIR, without having recourse to the rest of explanations contained in the Virgos/Schmidt Report, they would come to see that the particular wording alone is problematic on at least four points. By using the term *“should”* instead of *“shall”*, it leaves considerable margin of discretion to national courts in interpreting this concept; it doesn’t define which actions constitute the *“administration of interests”*; by using the word *“therefore”* it focuses on the *regularity* of the administration rather than on the

⁴⁸ In contrast, the Recast Regulation on insolvency proceedings, shifts the focus primarily onto the ‘third parties’ criterion, whereas the registered office presumption lays in the general background context, see *infra* Chapter III.2

⁴⁹ See *supra* n. 15.

⁵⁰ See Wessels, B. ‘International Jurisdiction To Open Insolvency Proceedings In Europe, In Particular Against (Groups Of) Companies’, International Insolvency Institute (2003), excerpt from a public lecture in Frankfurt available at www.iiiglobal.org

⁵¹ See par. 75 of the Virgos/Schmidt Report where it is further noted that *“Insolvency is a foreseeable risk. It is therefore important that international jurisdiction (...) be based on a place known to the debtor’s potential creditors. This enables the legal risks which would have to be assumed in the case of insolvency to be calculated”*.

⁵² Tirado, *supra* n. 16

perception of third parties (it seems as if the *regularity* of the administration is what makes it ascertainable by third parties); last but not least, it refers to “*third parties*” in general, without specific reference to the insolvent debtor’s *creditors* -which, however, are the ones at stake.

For all the above reasons, the Regulation’s ‘centre of main interests’ concept fell short of the anticipated results and expectations, while the striking *absence of a concrete definition*⁵³ thereof, raised severe criticism⁵⁴ as regards its ability to actually enhance legal certainty and predictability in cross-border insolvencies. It has been further speculated that such an absence of a relevant definition of COMI was probably dictated by “*fundamental political reasons*” and resulted from a “*purely political compromise*”⁵⁵ attempted intentionally by EIR.

No matter what the underlying motives may be, the lack of a concrete definition of COMI within EIR rendered the said concept particularly *concessive* in nature – thus subject to indefinite interpretational efforts and ongoing speculations as to its true essence. One of the most depictive characterizations thereof belongs to Lopucki⁵⁶, who aptly describes the introduced concept as “*too vague and volatile*” to be actually effective in preventing bankruptcy forum shopping within the Union.

3. The Shaping Of COMI By ECJ Case-Law

The concept’s deficiencies offered national courts considerable margins of discretion in adopting differing interpretations of COMI. Indeed, the lack of a single and objective definition could only leave ample room for *subjective* interpretations attempted by national courts⁵⁷.

Most of the times, however, such disparate national interpretations of COMI resulted from an intentional effort to “*keep proceedings at home*”⁵⁸; within the context of lack of ‘*mutual trust*’⁵⁹ between EU jurisdictions, national court would strive to prove that COMI is at their seat, in order to justify ex post their own jurisdiction for opening main insolvency proceedings. To that effect, national courts had often recourse to

⁵³ It is indeed a matter of paradox, that such a novel concept was introduced within EU law without being accompanied by a relevant explicit definition; neither art. 2 (*‘definitions’*), nor art. 3 (*‘international jurisdiction’*) of EIR actually define what COMI is.

⁵⁴ Belohlavek refers to such an absence as being “*a serious deficiency of the Regulation*”. See Belohlavek, supra n. 35

⁵⁵ Ibid, at 69, 70.

⁵⁶ See Lopucki, supra n. 5

⁵⁷ See Kastrinou, A. ‘Forum Shopping under the EC Regulation on Insolvency Proceedings’, 24(1) Intl. Co. & Com. L. Rev. (2013) p 20.

⁵⁸ Tirado, supra n. 11

⁵⁹ Such admitted lack of ‘mutual trust’ is the reason of frequent positive conflicts of jurisdiction between courts of Member states.

various elements and indications for the determination of COMI, which however were *irrelevant* to the concept itself and had very little to do with the objectives pursued by EU Insolvency Law⁶⁰.

However, as Tirado points out⁶¹, the main problem with the interpretations offered is that they failed to focus onto the “third parties” criterion. This view was supported by ECJ’s rulings in a number of significant cases, which have effectively shaped the notion of COMI into its current form. The two most important rulings as such were handed down in the so-called *Eurofood* and *Interedil* cases, in both of which the Court made it clear that COMI is an *autonomous* EU law concept; it “*must therefore be interpreted in a uniform way, independently of national legislation*”⁶².

a. Findings in Eurofood – the ‘third parties’ criterion

*Eurofood*⁶³ is considered to be a landmark case for EU Insolvency Law, as it has addressed several concurrent issues⁶⁴ in cross-border insolvencies and has shaped the proper framework within which COMI is to be determined.

The case concerned an Irish debtor company, ‘Eurofood’, which was a wholly-owned subsidiary of ‘Parmalat’ corporate group registered in Italy. Based on entirely different criteria for the determination of Eurofood’s COMI, Irish and Italian courts *both* held that they had jurisdiction to open main insolvency proceedings; the former by being the seat of the debtor company (registered office), and the latter by being the seat of the parent company (centre of control and economic planning). In view of the two *parallel* main insolvency proceedings, the Supreme Court of Ireland referred the case to the ECJ for a preliminary ruling that would resolve the conflict of jurisdiction.

In *Eurofood* the ECJ underlined the importance of the *third parties’ perception* as to where the actual COMI of the debtor is. In particular, the Court held that in cases

⁶⁰ Supra 58.

⁶¹ According to Tirado (supra n. 11 p. 7) “*the place of main administration is relevant because and so long as it is the place where the relevant third parties would have objectively, without needing to invest time and money to determine, thought the COMI to be*”.

⁶² ECJ, C-341/04, 2006, *Eurofood*, para. 31; C-396/09, 2011, *Interedil*, paras. 42, 43 and 44, and also Francisco Garcimartín, ‘The EU Insolvency Regulation: Rules On Jurisdiction’ University Autonoma of Madrid (2016) para. 5. Therefore, the interpretation of COMI shall belong to the exclusive competence of ECJ, as [the Court] is “*the final authority in the European Union for the determination of questions on the interpretation of E.U. law, including the E.U. Regulation*”, see Samuel L. Bufford, ‘Center of Main Interests, International Insolvency Case Venue, and Equality of Arms: The *Eurofood* Decision of the European Court of Justice’, *Northwestern Journal of International Law & Business*, Vol. 27 Issue 2 Winter (2007) which quotes Gabriel Moss Et Al., ‘The E.C. Regulation On Insolvency Proceedings And Annotated Guide’ (2002).

⁶³ Case 341/04, *Eurofood IFSC Ltd.*, 2006 E.C.R. 1-3813

⁶⁴ Although briefly discussed, such significant issues refer to the public policy exception applying to the international recognition of foreign insolvency judgements, the issue of fair legal process, as well as the very important issue of treatment of group of companies under the EIR.

where the parent company and the subsidiary have their registered offices in different member states, “*the mere fact that [the subsidiary’s] economic choices are or can be controlled by a parent company in another Member State*”⁶⁵ is insufficient to rebut the presumption of art. 3(1) EIR. On the contrary, the registered office presumption can be rebutted only where “*factors which are both objective and ascertainable by third parties*”⁶⁶ provide evidence that its COMI does not coincide with its registered office. Therefore, the viewpoint of third parties plays a decisive role in the determination of the debtor’s COMI, as it ensures *legal certainty and foreseeability* in transnational insolvency proceedings⁶⁷.

The ruling on Eurofood proceeds further in identifying such an *objective* factor that is capable to rebut the presumption of art. 3(1) EIR; the *realisation* of business activities by the debtor-subsidiary company. In particular, the Court distinguishes between companies actually carrying on business activities at their registered office, and the so-called “*letterbox*” companies⁶⁸ which lack *any* actual business activity at the place of registration. In the latter case, the presumption of art. 3(1) EIR can readily be rebutted from the viewpoint of third parties, as the COMI of the subsidiary actually coincides with that of the parent company’s⁶⁹.

b. Findings in Interedil – the ‘central administration’ criterion

Building further upon the foundations set in *Eurofood*, in *Interedil*⁷⁰ the Court proceeded in determining the relevant factors⁷¹, a *comprehensive assessment* of which can identify the debtor’s ‘*central administration*’ as its actual COMI.

The case concerned Interedil, an Italian-based company which had later transferred its registered office to the United Kingdom and soon thereafter closed all business activity there and was deregistered from the UK register. Following the filing for insolvency proceedings in Italy, Interedil challenged the jurisdiction of Italian courts on the basis that, since the last place of registration was in the UK, only English courts would have such jurisdiction.

⁶⁵ Eurofood, paras. 36, 37

⁶⁶ Ibid. paras. 33, 34, 37.

⁶⁷ Ibid. para. 33.

⁶⁸ Ibid. para. 35

⁶⁹ In para. 30 of the ruling in Eurofood, the Court emphasises that under EIR each debtor that constitutes a “*distinct legal entity*” shall be subject to its own jurisdiction. However, this is not the case in ‘*letterbox*’ subsidiary companies which are in fact empty corporate shells without actual business activity on their own. For this reason their COMI is rather to be found at the place where the parent company’s COMI is.

⁷⁰ Case 396/09, Interedil Srl (in liquidation) v. Fallimento Interedil Srl, Intesa Gestione Crediti SpA, 2011, ECLI:EU:C:2011:671

⁷¹ Interedil. paras. 52, 53.

In *Interedil* the ECJ highlighted the importance that the location of the debtor's 'central administration'⁷² has for the identification of its COMI. Elaborating further upon the findings in *Eurofood*, the Court held that a central administration as such may be identified by "*objective factors which are ascertainable by third parties*"⁷³. The said requirements of objectivity and third parties' ascertainability are met, where the debtor has made these factors *public* or at least *sufficiently accessible* to third parties, i.e. the company's *creditors* in particular⁷⁴.

Based on the above findings, the Court concluded that the registered office presumption of art. 3(1) EIR cannot be rebutted, if it is *ascertainable by third parties* that the company's central administration is at the same place as the company's registered office. By contrast, the said presumption can be rebutted where "*a comprehensive assessment of all the relevant factors makes it possible to establish, in a manner that is ascertainable by third parties*"⁷⁵, that the company's actual centre of administration is located in a state other than that of its registration.

⁷² By this term the ECJ refers collectively to the company's centre of management and supervision, the centre of decision-making and the centre of the management of its interests, see ruling in *Interedil* paras. 51 and 59

⁷³ *Interedil*, para. 59

⁷⁴ *Ibid.* para. 49

⁷⁵ *Ibid.* para. 59

CHAPTER III. RECAST REGULATION – A PROMISING REVISION

1. The Need For Reform

The decade that followed the adoption of the EU Insolvency Regulation was more or less a *'probationary period'* within which the effectiveness of EIR would be put to the test; art. 46 of EIR contained the explicit mandate for its review after 10 years of practical implementation⁷⁶. Indeed, transnational insolvency practices revealed various defects and shortcomings of the system which underlined the need for its revision. Therefore, in 2012 and on the basis of this provision, the Commission issued a Report⁷⁷ suggesting the reform of the Regulation. The external evaluation of the former resulted in the so-called *'Heidelberg-Vienna Report'*⁷⁸, which provided valuable insight regarding the proposed amendments to the EIR.

The findings of the said report reached the general conclusion that EIR was all in all a *"successful instrument"* in coordinating EU insolvency proceedings, therefore a *radical* change of its core structure and policies was unnecessary⁷⁹. However, the report identified certain *"obvious shortcomings"*⁸⁰ in EIR that called for targeted amendments. The core issues of concern were identified in five key areas of the existing regime; the not-so-smooth instrumentation between main and secondary insolvency proceedings; the current inability of creditors to be aware of an insolvency proceeding taking place; the legislative gap regarding group insolvencies; the proven ineffectiveness of the ambiguous COMI concept in the battle against forum shopping; and, the significantly limited scope of EIR which –unlike several national regimes– precluded pre-insolvency and debt-restructuring proceedings from its scope⁸¹.

⁷⁶ According to art. 46 EIR *"No later than 1 June 2012, and every five years thereafter, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Regulation. The report shall be accompanied if need be by a proposal for adaptation of this Regulation"*.

⁷⁷ See 'Report from the Commission on the application of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings', COM(2012)

⁷⁸ The EU Commission assigned the universities of Heidelberg and Vienna to perform an external evaluation of the Report presented in 2012, the product of which was the so-called Heidelberg-Vienna Report. See 'External Evaluation of Regulation No. 1346/2000/EC on Insolvency Proceedings, JUST/2011/JCIV/PR/0049/A4', prepared by Burkhard Hess, Paul Oberhammer & Thomas Pfeiffer available at the official website of the European Commission.

⁷⁹ See G. McCormack, 'Reforming The European Insolvency Regulation: A Legal And Policy Perspective', Journal of Private International Law Vol. 10 No. 1 (2014). As McCormack concludes *"[T]he Regulation is widely understood to work in practice"*.

⁸⁰ Supra 78.

⁸¹ For a detailed analysis of the main shortcomings identified in EIR see McCormack (supra n. 79), Amey, R. 'Reform to the European Insolvency Regulation', International Corporate Rescue – Special Issue,

Based on these findings, on 20 May 2015 the European Parliament and the Council adopted the Recast Regulation on Insolvency Proceedings⁸² (Recast), the largest extend of which will enter into force on 26 June 2017⁸³. By addressing the drawbacks detected in EIR, the Recast sets out to achieve greater results regarding the overall efficiency of the EU insolvency system. In particular, it introduces notable amendments in the management of transnational insolvency proceedings, which provide for the better alignment between main and secondary proceedings, enhanced publicity and transparency through inter-connected information flows⁸⁴, as well as explicit rules regarding the recurrent issue of group insolvency proceedings⁸⁵.

Amidst the said “procedural” reforms, the spotlight turns onto *substantial* issues of EU Insolvency law, the recasting of which generates new prospects for the European insolvency scene. In this regard, the Recast expands its material scope in order to encompass also pre-insolvency proceedings and other debt-restructuring procedures, which aim at the salvation of business activity and the promotion of economically viable solutions⁸⁶. Therefore, by shifting the focus *off* liquidation, the Recast readily moves towards the adoption of *debt-reorganisation* objectives, which respond better to the imperative needs of current economic reality. Furthermore, the Recast finally provides the long anticipated *definition* of COMI; although the efficiency of the latter is yet to be seen, there is no doubt that it ultimately puts an end to ongoing speculations and debates concerning the concept’s interpretation.

The said reforms create valid optimism that the new regime will be more efficient in the pursuit of the objectives set by the Community, especially when seen under the prism of a novel stance taken towards forum shopping. Recast’s explicit mandate to combat “*abusive*” forum shopping *hinds* not only that a ‘positive’ type thereof exists, but more importantly that a forum-shopping practice as such may actually evade the preventive scope of the regulation.

South Square Articles (2015), and also Bob Wessels, ‘The EU Regulation on Insolvency Proceedings (Recast)’ Technical note (2015)

⁸² Regulation EU 2015/848 –OJ L 141. 5.6.2015

⁸³ See art. 92 Recast, according to which only 3 provisions thereof will not enter into force on 26 June 2017.

⁸⁴ See art. 83 and 87 of Recast relating to the establishment of publicly accessible insolvency registers operating within an interconnected system.

⁸⁵ The event of insolvency of an undertaking as member of a group of companies is a quite frequent phenomenon in the modern world of economy. This issue, albeit forsaken when drafting the EU Insolvency Regulation, was examined by the ECJ in the famous ‘Eurofood’ case; the so-called “Eurofood doctrine” for corporate groups has largely affected the relevant provisions of the Recast Regulation. See Mevorach, I. ‘Centralising Insolvencies of Pan-European Corporate Groups: a Creditor’s Dream or Nightmare?’, *Journal of Business Law* 468 (2006).

⁸⁶ See G. McCormack, ‘Something Old, Something New: Recasting the European Insolvency Regulation’ *The Modern Law Review* (2016)

2. Recasting COMI

Before getting to the gist of it, it should be noted that the Recast did not '*re-invent the wheel*' in terms of COMI; it is more apt to say that the Recast *ratified* the already known findings of ECJ regarding the concept's interpretation, by literally transposing the shaped jurisprudence into EU Law⁸⁷. In this regard, no *radical recast* of COMI takes place, therefore the opinion⁸⁸ that the language itself implies more far fetching changes than those actually effected by the new regime, might be correct on this particular issue⁸⁹. Indeed, Tirado comments that the amendments purport to "*improve the COMI, not to do away with it or transform it drastically*"⁹⁰. Hence, the purpose of the Recast is not the drastic transformation of the existing structure in COMI, but rather its improvement through *consolidation* and introduction of several *material rules* of interpretation⁹¹.

The first important amendment is the introduction of an express definition of COMI in the second sentence of art. 3(1) of the Recast, which reads as follows: "*The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties*". Although *resembling*⁹² to the description of COMI as contained in recital (13) of EIR, the said definition is freed from the problematic elements of the former. First, it states that the COMI "*shall*" be at the place of main administration, thus leaves no room for otherwise discretionary interpretation; second, it eliminates the word "therefore" existing in recital (13) of EIR, thus requires that such an administration is conducted on a regular basis *and* is ascertainable by third parties⁹³.

Furthermore, recital (28) in Recast explicitly states that "third parties" should refer especially to *creditors* and their perception as to the actual COMI of the debtor,

⁸⁷ Recital (30) of the Recast Regulation is a literal transcription of ECJ'S ruling in the Interedil case, para 59.

⁸⁸ McCormack holds that the changes to EIR are "*not as far reaching and fundamental as the language might imply*" (supra at 86) while Eidenmuller characterizes the revisions as a "*modest attempt (...) to improve the status quo*", see Eidenmuller, H. 'A New Framework for Business Restructuring in Europe: The EU Commission's Proposals for a Reform of the European Insolvency Regulation and Beyond' 20 Maastricht Journal (2013) 133, 150

⁸⁹ It seems that the Recast Regulation may indeed reach farther results in certain areas of reform; such areas are the new scope rationae materiae of the regulation and the new approach it takes towards forum shopping, in view of the new orientation of EU law towards debt-restructuring objectives.

⁹⁰ See Tirado, supra n. 11, p. 14.

⁹¹ Ibid.

⁹² In contrast to Tirado's view (ibid.) who supports that the definition provided by Recast is a literal transcription of what was earlier recital (13) of EIR, a careful comparison of the two texts shows that there are substantial grammatical differences between them that create a different context of meaning.

⁹³ By this wording, the definition focuses equally upon the regularity of the activity and the perception of third parties, detaching the dependence of the latter from the former. See, by contrast, Chapter II.2 for a relevant detailed analysis of recital (13) EIR.

while providing also that this may require *adequate* and ‘*in due course*’ notification of creditors regarding potential shifts in COMI. Therefore recital (28) incorporates the doctrine of *ISA Daisytek*⁹⁴ that interprets ‘third parties’ as referring mainly to creditors, and *Interedil* according to which certain publicity requirements ought to be met⁹⁵.

As regards the ‘registered office presumption’, the leading view is that it has been formulated much “*stronger*”⁹⁶. Recital (30) in Recast provides enhanced guidelines as to *when* such presumption *should be rebuttable*. In particular, it incorporates an actual excerpt from the dicta in *Interedil*, which requires a “*comprehensive*” assessment of “*all relevant factors*” in a manner “*ascertainable by third parties*” (i.e. creditors according to recital 28) in order to revoke the presumption. Furthermore, the Recast advises national courts to *carefully* assess all the relevant factors which prove that the debtor’s COMI is *genuinely* located in their jurisdiction⁹⁷. Hence, it suggests that relevant claims raised by the debtor himself should not be taken for granted, without supporting proof⁹⁸.

Another important amendment in Recast is that it expressly acknowledges the *correlation* between the way COMI is shaped and the whip-saw effect on forum shopping. In this regard, art. 3(1) para. 2 introduces a ‘*look-back*’ period on the application of the registered office presumption; in particular, the presumption does not apply when the registered office has been relocated to another Member state within the 3-month period before filing for insolvency proceedings. In such an occasion, the presumption will continue to apply for the place of the *former* registered office. Consistent with the explicit mandate in recital (29) of Recast, this safeguard reflects the effort to prevent “*fraudulent or abusive*” forum shopping on the part of debtors seeking to avail themselves of ‘debtor-friendlier’ jurisdictions.

3. Revisiting The Purpose Of Insolvency Proceedings

Unlike the EU Insolvency Regulation which focused almost exclusively on liquidation⁹⁹, the Recast places clearly the emphasis on *debt-restructuring* objectives. In this regard, while liquidation formerly used to be at the epicentre of insolvency proceedings, now it

⁹⁴ Re Daisytek – ISA Ltd and others [2003] All ER (D) 312 (Jul)

⁹⁵ C - 396/09 Interedil, para. 49 (supra at 74)

⁹⁶ See Wessels supra at 81

⁹⁷ Recital (27) Recast.

⁹⁸ Recitals (32) and (33) Recast. See also G. McCormack, supra at 86 p. 131

⁹⁹ McCormack (ibid) aptly stresses that in EIR liquidation “*was considered to be the paradigmatic insolvency procedure*”. According to art.1(1) of EIR, its scope extended only to “*collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator*”. Keen on the primary purpose of liquidation, the Regulation considered secondary proceedings merely as “*liquidating proceedings*”, while the person administering the insolvency estate was referred to as ‘liquidator’ even where his task was not liquidation.

is just one of the existing options –if not the *least* favoured one. Indeed, the Recast adopts a neutral vocabulary which purports to limit references to liquidation to the minimum necessary level; in this context, the term “liquidator” is replaced by the term “insolvency practitioner”¹⁰⁰ while secondary proceedings are no longer conceived merely as “liquidating proceedings”.

Some commentators believe that this ‘crusade’ against liquidation may have the opposite results from the purported, as liquidation may ultimately be the “*swiftest method*” for maximizing the economic efficiency of assets¹⁰¹. Some others, however, don’t see such far-reaching results within the new stance that Recast takes regarding liquidation; in fact, they support the view that the new terminology has merely *nominal* value and psychological dimensions, as it purports to eliminate the negative echo transmitting from the term ‘liquidator’¹⁰².

However, a closer look at the rationale underlying the new terminology indicates that the Recast makes a *genuine* shift towards promoting efficient debt restructuring. After all, this purpose is aligned with the general objectives already set by EU law in the context of promoting sustainable growth and economic recovery within the Union. As McCormack points out¹⁰³, the Recast should be therefore perceived as part of the *Europe 2020 growth strategy*¹⁰⁴, which promulgates the sustainment of economic activity and the adoption of efficient solutions for the survival of business. Within the same context, the subsequent 2014 Commission Recommendation¹⁰⁵ speaks about ensuring *early-stage restructure* and offering “honest” bankrupt businesses a ‘*second chance*’, objectives which are almost identically transposed into the recitals of the Recast Regulation.

In particular, recital (10) of Recast explicitly states that the Regulation should encompass procedures which aim to “*promote the rescue of economically viable but distressed businesses*”¹⁰⁶ by providing them a “*second chance*” in the pursuit of their ventures. What is particularly noteworthy regarding this objective is that it purports to

¹⁰⁰ See art. 2(5) of Recast wherein the relevant definition of insolvency practitioner is provided.

¹⁰¹ See McCormack, *supra* at 86. McCormack believes that sometimes fixating on restructure instead of liquidation may have counter effects on the overall economy, as it may distort competition between businesses and prevent assets from being allocated to their most efficient use.

¹⁰² See Weiss, M. ‘Bridge over Troubled Water: The Revised Insolvency Regulation’, *International Insolvency Review*, Winter, Vol.24 (2015)

¹⁰³ McCormack, *supra* n. 86, p.121-122

¹⁰⁴ See Communication from the Commission, ‘Europe 2020 – A Strategy for Smart, Sustainable and Inclusive Growth’, COM(2010).

¹⁰⁵ Commission Recommendation of 12 March 2014 on a New Approach To Business Failure And Insolvency, Official Journal of the European Union, 2014/135/EU.

¹⁰⁶ Recital (10) of the Recast Regulation bears high resemblance to recital (1) of the 2014 Commission Recommendation.

sustain *business activity*, rather than engage in sheer *company rescue*¹⁰⁷. This is clearly evident also in recital (11) which brings into the scope of the Regulation procedures granting a temporary stay against enforcements actions which could “*hamper the prospects of a restructuring of the debtor’s business*”¹⁰⁸.

It becomes therefore apparent that the debt-restructuring purposes promulgated by the Recast are something more than sheer declarations; on the contrary, they seem linked with a general movement of the Community towards establishing more favourable conditions for the survival of business, continuance of economic activity, and employment preservation.

Keen on the pursuit of the said objectives, the Recast extends its scope of application to a wide variety of insolvency proceedings which aim in the “*rescue, adjustment of debt or reorganization*”¹⁰⁹, whereas the purpose of liquidation seems to be “pushed back” at the end of the line¹¹⁰. In this regard, even though the restructuring goal is not expressly *prioritized* above the others, the recasted version of the Regulation seems to place the said objective into a rather prominent position.

Yet, the most noteworthy accomplishment is the expansion of the Recast also to *pre-insolvency* proceedings, i.e. procedures triggered by the mere *likelihood* of insolvency. As explicitly stated in art.1(1) of Recast, such proceedings have the mandate to prevent the debtor’s insolvency or the winding up of business operations. Within this ample legal framework, debtors have increased prospects for efficient re-organization of their business, since they are able to restructure “on a clear day”, without even falling into the insolvency status.

¹⁰⁷ See Vanessa Finch, ‘Corporate Rescue: A Game of Three Halves’ 32 Legal Studies 302 (2012)

¹⁰⁸ Recital (11) of Recast

¹⁰⁹ Art. 1(1) of Recast

¹¹⁰ It should be noted that the purpose of liquidation is mentioned last among the objectives pursued in insolvency proceedings, as these are listed in art. 1(1) of the Recast.

CHAPTER IV. IMPLICATIONS AND PROSPECTS FOR FORUM SHOPPING WITHIN THE EU

1. Forum shopping under the COMI perspective

Under the ‘modified universalism’ system adopted by EU law¹¹¹, the ability to forum shop depends exclusively upon the *vulnerability* of COMI; therefore, the way the latter is formulated entails significant implications with regard to the rise and fall of bankruptcy forum shopping within the Union.

As previously analyzed¹¹², the introduction of COMI in EIR served mainly the purpose of enhancing legal certainty as to the bankruptcy seat of insolvent debtors¹¹³. At the same time, the initial concept retained *intentionally* a considerable degree of obscurity. In this way, the EIR purported to frustrate potential endeavours for ‘*bankruptcy tourism*’ across EU jurisdictions¹¹⁴. Nevertheless, the *excessively* volatile nature of COMI had ultimately results contrary to the said objective. Such a failure was mainly linked to the lack of a relevant definition of COMI and the high level of interpretational discretion granted to national courts. These factors, combined with the lack of ‘mutual trust’, enabled national courts to formulate their own criteria for the interpretation of COMI in an effort to grasp onto their jurisdiction¹¹⁵. Within this context, ‘forum shoppers’ found a welcoming *breeding ground* for even easier manipulations of their COMI¹¹⁶.

In response to this ambiguous situation, the primary objective of the Recast was to enhance *certainty* and *predictability* in the interpretation of COMI. As established previously¹¹⁷, the Recast provides a relevant definition of COMI as well as specific guidelines for its uniform interpretation. In terms of forum shopping prevention, the

¹¹¹ See Chapter I.3

¹¹² See Chapter II.2

¹¹³ See Andrew T. Guzman, ‘International Bankruptcy: In Defence of Universalism’, MICH. L. REV. 98: 2177 (2000) p. 2208, where the author praises universalism for its enhanced predictability.

¹¹⁴ See recital (4) of EIR which aims to discourage parties from transferring “*assets or judicial proceedings from one Member state to another, seeking to obtain a more favourable legal position (forum shopping)*”.

¹¹⁵ See Pottow, John A. E. ‘The Myth (and Realities) of Forum Shopping in Transnational Insolvency’, Brook. J. Int’l L. 32, no. 3 (2007) p. 811-813 and also Pottow, ‘Greed and Pride in International Bankruptcy: The Problems of and Proposed Solutions to “Local Interests”’, 104 MICH. L. REV. 1899, (2006), p. 1918-19

¹¹⁶ In view of the disparities among the ‘national’ interpretations of COMI, debtors could just ‘select’ the jurisdiction whose criteria for the determination of COMI were more fit to the debtor’s situation or more easily adapted to.

¹¹⁷ See Chapter III.2

introduction of the 'look-back' period¹¹⁸ is considered as an additional safeguard that may effectively stump abusive COMI shifts which place their hopes on the registered office presumption¹¹⁹. But is this new formulation of COMI the adequate recipe to prevent forum shopping? Could it be that, in the effort to clear the clouds over the concept's interpretation, the Recast Regulation just makes COMI *even more vulnerable* to manipulation?

Before discussing such an hypothesis, it is important to note that legal certainty through uniform interpretation is imperative for every autonomous EU law concept, such as the COMI. In this regard, the voices complimenting the Recast for the improvements in COMI have a certain point¹²⁰. However, enhanced certainty creates increased *predictability*, which might have the exact opposite effects than the ones sought in terms of forum shopping prevention. As Pottow puts it, "*predictability is a necessary prerequisite to forum shopping*"¹²¹. Although this view was originally expressed in regards to the generic side-effects of universalism as opposed to territorialism, it does however stress a valid point; enhanced predictability reduces the uncertainty costs of forum shopping, which would otherwise be "*highly risky*" thus presumably avoided¹²².

Applying this assumption to the increased predictability of Recast's COMI -in comparison to its previous form under EIR- it is doubtful that the new concept *per se* can be more efficient in forum shopping prevention¹²³. On the contrary, it can be argued that the 'enhanced' COMI can effectively serve as a "user's manual", actually facilitating debtors in the execution of forum shopping strategies¹²⁴. A careful planning of a forum selection strategy, based on thorough examination of the –now largely clarified- prohibitions and limitations set by the Regulation, together with a timely shift in COMI which complies with the 'look-back' requirement, and especially after using the

¹¹⁸ Art. 3(2) of Recast, analyzed previously at Ch. III.2

¹¹⁹ See recital (31) of Recast stating that the registered office presumption "*should not apply where (...) the debtor has relocated its registered office (...) within the 3-month period prior to the request for opening insolvency proceedings*".

¹²⁰ See for example Richard Tett and Katharina Crinson, 'The Recast EC Regulation on Insolvency Proceedings: A Welcome Revision', Corporate Rescue and Insolvency (ISSN 1756-2465) Volume 8.2 April (2015).

¹²¹ Pottow (2007), *supra* n. 115.

¹²² *Ibid.* See also Nita Ghei and Francesco Parisi, 'Adverse Selection and Moral Hazard in Forum Shopping: Conflicts Law as Spontaneous Order', 25 CARDozo L. REV. 1367, 1373 (2004), who support the view that "*Uncertainty about which jurisdiction's law applies would actually reduce forum shopping*."

¹²³ Thus the view that the COMI concept has been formulated much "*stronger*" (see Tirado, *supra* at 96 p.18) is right when comparing it to its previous form; this is not the case, however, as regards its strength against forum shopping.

¹²⁴ Knowing a priori the *do's* and *don'ts* applying in COMI determination, 'forum shoppers' have greater chances in effecting 'eligible' COMI shifts.

proposed methods¹²⁵ for the duly notification of creditors about the relocation, may have more *accurate* results than it would have under the EU Insolvency Regulation.

It would be quite strange to assume that the Recast did not consider such a possibility when recasting COMI. Just to be fair, though, it did retain a certain degree of uncertainty in the final step of COMI determination; by reinforcing the ‘third parties perception’ criterion¹²⁶ it imposes a last threshold of judicial scrutiny, since the former requires always *ad hoc* determination. In particular, even where a COMI shift is effected in accordance with the ‘look-back’ period requirement, the *subjective* obstacle of ‘creditors’ perception’ shall be further surpassed; ultimately, the relocation may not be regarded as an ‘honest’ and genuine COMI shift, if it is not perceived as such by the debtor’s creditors.

Taking all the above factors into consideration, perhaps it is more apt to assume that the Recast was aware of the concept’s vulnerability against forum shopping, as a consequence of the increased certainty of the former. This could be therefore one of the reasons why the Recast decided to change its view regarding forum shopping *itself*.

2. Taking A Fresh View On Forum Shopping

After a decade of severe criticism against EIR’s COMI, it can be said that the Recast’s reforms thereon were more or less *anticipated*. What was least expected however¹²⁷, is the new stance that the Recast adopts towards forum shopping *per se*; through an implied distinction between ‘good’ and ‘bad’ forum shopping, the Recast departs from what previously used to be common knowledge, i.e. that forum shopping *in general* is prohibited under EU law.

When comparing the texts of the original Insolvency Regulation and of the Recast a sticking difference come to surface as regards the *definition* of COMI. Interestingly enough, the context of recital (4) in EIR is quite different from the corresponding recital (5) in Recast. More specifically, the Recast incorporates an *additional evaluative criterion*, which drastically alters the former definition. In addition to the requirements set in EIR, in Recast the transfer of assets or judicial proceedings to other jurisdictions constitutes forum shopping, where such a transfer is “*to the detriment of the general*

¹²⁵ See recital (28) of Recast, wherein examples of due information to creditors are provided.

¹²⁶ See the “*ascertainable by third parties*” requirement of art. 3(1) and the guidelines in recital (28) of Recast.

¹²⁷ Although the view that forum shopping need not always be seen as bad, has been expressed in the past (see *infra*. note 131), it was not expected that such a ‘confession’ would be formally inserted into EU law.

*body of creditors*¹²⁸. Therefore, an *a contrario* interpretation reveals that forum shopping need not be prevented where it somehow *benefits* the debtor's creditors.

Taking this position a step further, recital (29) of the Recast explicitly sets the goal of preventing “*fraudulent or abusive*” forum shopping, whereas the EIR did not contain such a clarification¹²⁹. Therefore, the use of such wording leads to the following assumptions; first, that the Recast purports to detach any negative meaning from the term ‘forum shopping’ as *such*¹³⁰; second and foremost, that it draws an *implicit* distinction between ‘detrimental’ and ‘positive’ forum shopping, which can effectively alter the landscape of transnational insolvencies within the Union.

As radical as it may seem, such a distinction of forum shopping was actually discussed much earlier in commentaries and relevant case law¹³¹. In particular, it has been speculated that perhaps forum shopping is “*not all that bad*”¹³² when seen as a natural “*optimisation of procedural possibilities*”¹³³, and that it may not amount to *abuse* of EU Insolvency Law when “*dealing with anticommons problems and their related hold-out behaviour*”¹³⁴. Nonetheless, the acknowledgement that a ‘legitimate’ kind of forum shopping may exist, is an entirely different thing when expressed merely as an *opinion* from being elevated into the status of a provision of EU law. In this regard, the Recast does implement a revolutionary framework within which the future of bankruptcy forum shopping is to be redesigned.

Although the rationale behind such a distinction is understandable, the Recast’s implied distinction raises several questions which, unfortunately, are left unanswered. The primary question as such refers to what the actual meaning of “*fraudulent or abusive*” forum shopping is and under which *criteria* the detrimental effects on creditors

¹²⁸ Recital (5) of Recast repeats the exact same wording of recital (4) of EIR, while adding the aforementioned phrase at the end. As a consequence, the material definition of forum shopping under the Recast is entirely different from the one contained in EIR.

¹²⁹ In EIR the only reference to forum shopping was contained in recital (4), where nothing implied that a positive type of forum shopping may exist.

¹³⁰ Indeed, the term forum shopping is commonly perceived to have a negative sense. See for example Lord Simon in ‘The Atlantic star’ (1974) AC 436-437, who comments that forum shopping is a “*dirty word*”.

¹³¹ See McCormack, *supra* n. 86 and Opinion of A.G. Colomer in Case C-1/04, Susanne Staubitz-Schrieber, 2006 E.C.R. 1-701. Colomer opined that “*in the absence of legal uniformity (...) that phenomenon must be accepted as a natural consequence which is not open to criticism Forum shopping is merely the optimisation of procedural possibilities and it results from the existence of more than one available forum, which is no way unlawful*”. C-1/04 - Staubitz-Schreiber, Opinion A.G. Colomer ECLI:EU:C:2005:500

¹³² See Pottow, *supra* n. 115 p. 814

¹³³ Opinion of A.G. Colomer, *supra* n. 131

¹³⁴ See de Weijs, Roelf Jakob and Breeman, Martijn, ‘Comi-Migration: Use or Abuse of European Insolvency Law?’, Amsterdam Law School Research Paper No. 2013-38 (2013); Centre for the Study of European Contract Law Working Paper Series No. 2013-07 (2013).

are to be assessed¹³⁵. Adversely, equally important is to ascertain which relocations should fall under the 'legitimate' forum shopping ambit, which as such may escape the preventive scope of EU Insolvency Law.

3. Reading Between The Lines Of The Implied Distinction

In the absence of any relevant guidelines within the Recast, providing a straightforward answer to the said questions is not an easy task. As various considerations are in place, it has been argued¹³⁶ that it is difficult to ascertain whether the COMI shift is *fraudulent* and whether such relocation amounts to *abuse*, especially in cases where the relocation is to the detriment of some creditors but at the same time to the *benefit* of some others¹³⁷. Therefore, as *J. Armour* points out, it is difficult to draw "*the dividing line between good and bad forum shopping*"¹³⁸.

In the attempt to determine 'bad' forum shopping, regard should be given to the meaning of the terms 'fraudulent' and 'abusive'; whereas the former refers to non-genuine relocations of COMI -or even to *intentional misrepresentation of facts* related to the actual debtor's COMI¹³⁹-, the latter is more difficult to determine. Abuse requires the crossing of a threshold while exercising a right provided by law, so that it ends up frustrating or cancelling the exercise of other parties' rights. Indeed, it should not be forgotten that COMI migration is an expression of the fundamental *freedom of establishment* as portrayed in art. 49 TFEU¹⁴⁰; hence, COMI relocation is in principle the exercise of a fundamental right, which nonetheless may amount to an *abuse* where it effectively deprives creditors of the exercise of their rights.

There have been several proposals as to which criteria and tests would be suitable in determining forum shopping as abusive; some commentators suggested the "creditors' unanimous consensus"¹⁴¹ criterion or the "assets maximization"¹⁴² test as

¹³⁵ Mevorach had foreseen that such an issue would arise with the advent of the Recast Regulation. See Mevorach, I. 'Forum Shopping In Times Of Crisis: A Directors' Duties Perspective', *European Company and Financial Law Review*, 10 (4).(2013) ISSN 1613- 2548, p. 532.

¹³⁶ See Eidenmüller, H. 'Abuse Of Law In The Context Of European Insolvency Law' *European Company and Financial Law Review* 1, (2009) 11.

¹³⁷ A Walters and A Smith, 'Bankruptcy Tourism Under The EC Regulation On Insolvency Proceedings: A View From England and Wales' *IIR* 2010, 19(3) 181.

¹³⁸ See J Armour, 'Abuse of European Insolvency Law? A Discussion' in R de la Feria & S Vogenauer (eds), *Prohibition of Abuse of Law: A New General Principle of EU Law?* Oxford University Press (2011).

¹³⁹ See Mevorach, *supra* n. 135. This scenario refers to fraudulent manipulation as to the actual location of the debtor's COMI, while no actual relocation takes place.

¹⁴⁰ *Supra* at. 42

¹⁴¹ P Paschalidis, 'Freedom of Establishment and Private International Law for Corporations', Oxford University Press (2012), p. 221. The author suggests that a COMI shift is not abusive if all creditors have consented thereto.

proper indicators. Nevertheless, in the absence of formal judicial recognition of such tests, ‘detrimental’ forum shopping practices, for the purposes of EU law, are generally considered in literature non-genuine relocations of COMI which are driven by the debtor’s “*self-serving*” intention¹⁴³ to hide assets, escape from liabilities, or make use of more favourable bankruptcy laws at the expense of its creditors or a particular group thereof.

In light of the above then, what should be regarded as ‘legitimate’ forum shopping? In the absence of any explicit guidelines within EU law, its context can only be determined by contrast to ‘detrimental’ forum shopping. The leading view is that a legitimate type of forum shopping could presumably refer to relocations of COMI for the benefit of the general body of creditors *as a whole*¹⁴⁴. The most prominent example in literature of such a positive COMI shift is the relocation for the purpose to *maximize* the value of assets, by making use of more favourable bankruptcy laws or procedures¹⁴⁵. This however represents a narrow, “*proceduralist*” approach to insolvency law¹⁴⁶, according to which insolvency proceedings have the sole purpose of collective return maximization.

The novel, debt-restructuring oriented regime of the Recast¹⁴⁷, however, suggests that the ambit of what may be considered as legitimate forum shopping should be much broader¹⁴⁸. Within the new mandate to rescue “*economically viable but distressed businesses*”¹⁴⁹, the positive forum shopping notion should refer to COMI relocations that offer opportunities for the salvation of business, debt-reorganization and effective continuation of economic activities¹⁵⁰, while bearing in mind also *social* considerations, such as the preservation of employment and reinforcement of entrepreneurship.

It seems, however, that this distinction can only make sense when perceived through the creditors’ point of view. If creditors were to be offered adequate protection,

¹⁴² Eidenmüller (supra n. 136, 16) suggests forum shopping may not be deemed abusive where the relocation results in increasing the net assets of the debtor.

¹⁴³ Mevorach, supra n. 135.

¹⁴⁴ Ibid. As Mevorach aptly points out “*relocations aimed at benefiting a section of the stakeholders must be regarded detrimental*”.

¹⁴⁵ See, for example, McCormack supra n. 86 and Eidenmüller supra n. 136.

¹⁴⁶ See TH Jackson, ‘The Logic and Limits of Bankruptcy Law’, Harvard University Press (1986)

¹⁴⁷ See Chapter III. 3

¹⁴⁸ This is also aligned with the “*traditionalist*” approach to insolvency law, according to which the former should seek to balance and accommodate a wider range of interests. See Jackson, supra at 146

¹⁴⁹ Recital (10) of the Recast.

¹⁵⁰ See Finch, supra n. 107.

then shifts in COMI could become more *flexible*, as national courts would be more readily inclined to categorize them under the ‘positive’ forum shopping notion.

4. Future Prospects For Forum Shopping Within The Union

From the analysis presented above, it becomes apparent that there is a cohesive link between the implied distinction in forum shopping and the Recast’s new focus on debt restructuring objectives. After all, the latter could not be effectively accomplished within a legal framework that *indiscreetly* inhibits COMI relocations, irrespective of the underlying motives and the aims pursued. Under this perspective, new prospects emerge for the future of bankruptcy forum shopping within the Union.

In particular, Recast’s new approach towards forum shopping is anticipated to provide increased *flexibility* in COMI shifts effected for the purpose of opening main insolvency proceedings. Forum shopping legitimization can effectively facilitate relocations that are indeed beneficial for the general body of creditors, but would otherwise not be effected due to reluctance or because they would be deemed as unforeseeable risk on the part of insolvent debtors. However, it can be validly assumed that the wider impact of the new regime will be identified in the pre-insolvency stage; by encompassing pre-insolvency proceedings into its scope, the Recast offers the opportunity for an efficient ‘legitimization’ of COMI shifts taking place at a time period prior to insolvency, which is very crucial in terms of insolvency *prevention*.

Hence, by enabling debtors, who honestly pursue reorganizational objectives, to be lawfully subjected to more favourable laws already from an *early stage*¹⁵¹, the Recast can effectively contribute to the *economic recovery* and *sustainability* objectives envisaged within the *Europe 2020 growth strategy*¹⁵². Furthermore, such forum shopping legitimization is aligned with the internationally accepted ‘directors’ duties regime¹⁵³ promulgated by UNCITRAL. As Mevorach points out, it would be “*consistent with the general benchmarks regarding directors’ obligations in the period leading up to insolvency*”¹⁵⁴.

Within this novel context, it is speculated that bankruptcy forum shopping will not only diminish, but actually *increase* in the years to come. On the basis of the previous arguments, this is not a bad outcome when referring to ‘legitimate’ forum shopping; it is

¹⁵¹ See Commission Recommendation *supra* at 105 and also recital (10) of the Recast.

¹⁵² *Supra* n. 104

¹⁵³ See UNCITRAL ‘Legislative Guide on Insolvency Law, Part four: Directors’ obligations in the period approaching insolvency’ United Nations New York (2013)

¹⁵⁴ See Mevorach, *supra* n. 135

probably fair to say that, in the context of enhancing the efficiency of transnational insolvency proceedings, the Recast seems to essentially *promote* such beneficial relocations.

Nonetheless, there is always the threat that such flexible framework may give rise to abusive forum shopping as well, only this time under the *disguise* of pursuing legitimate aims. This places once again the burden on courts to scrutinize COMI relocations on an *ad hoc* basis and formulate the necessary and appropriate *criteria*, according to which the essence of 'legitimate' forum shopping will be more clearly -and perhaps more strictly- defined.

Conclusions

In contrast to the widespread criticism against the initial concept of COMI, the Recast's amendments introduced therein have generally received positive reviews. The new Regulation rectifies some obvious defaults of the previous regime, while setting the basis for enhanced legal certainty and predictability across the Union. On the other hand, the significantly enlarged scope and redefined objectives of the Recast, can effectively redesign the overall purpose of EU Insolvency law. Such an improved legal framework is expected to enhance the efficiency of transnational insolvency proceedings and facilitate companies in legitimately pursuing viable solutions instead of being faced only with the option of liquidation.

Even more importantly though, the Recast adopts a more realistic and streamlined approach towards forum shopping, which better reflects the state and needs of current economic reality. By accepting that a 'legitimate' type of forum shopping may exist, the new regime sets forth a revolutionary framework within which COMI migration is to be perceived. In this regard, it creates new prospects for the future of bankruptcy forum shopping within the Union.

Yet, the Recast remains particularly silent as regards the nature and scope of such 'positive' relocations, a fact that hints a conscious choice; the Recast simply points towards the proposed direction, whereas the optimum route to be taken shall be further specified by national courts. The latter bear also the burden to unmask possible attempts of abusive forum shopping, presenting themselves as legitimate ones. Within this context, only time and international practice will tell whether the choice to offer such a window of opportunity was a wise one.

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